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SUPERIOR COURT CLERK
SEATTLE, WA.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

COURTNEY LOVE COBAIN, individually,
and on behalf of FRANCES BEAN COBAIN,
the minor child of COURTNEY LOVE
COBAIN and KURT COBAIN,

Plaintiffs,

v.

DAVID GROHL, KRIST NOVOSELIC,
NIRVANA, L.L.C., a Washington Limited
Liability Company.

Defendants.

No. 01-2-13059-5SEA

DEFENDANTS' MOTION TO COMPEL
MENTAL EXAMINATION OF
PLAINTIFF COURTNEY LOVE

I. INTRODUCTION AND RELIEF REQUESTED

Pursuant to both CR 35 and the Limited Liability Company Agreement establishing Nirvana L.L.C. ("L.L.C. Agreement"), Defendants David Grohl, Krist Novoselic, and Nirvana L.L.C. ("Defendants") request that the Court issue an order requiring Plaintiff Courtney Love to submit to a psychiatric examination prior to June 1, 2002. Because Ms. Love claims that she was "incapacitated" at the time she entered into the L.L.C. Agreement, and because Defendants' counterclaims alleged that Ms. Love currently lacks the mental capacity to perform the obligations imposed upon her by the L.L.C. Agreement, Defendants have satisfied CR 35 by producing sufficient information to demonstrate that Ms. Love's capacity is at issue in this case.

DEFENDANTS' MOTION TO COMPEL MENTAL
EXAMINATION OF PLAINTIFF COURTNEY LOVE - 1

ORIGINAL

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1 **B. Plaintiffs' Claims In This Case.**

2 Plaintiffs' complaint alleges that Ms. Love was "incapacitated" at the time she entered
3 into the L.L.C. Agreement, indicating:

4 Courtney Love requests that this Court declare that the L.L.C. was not
5 properly formed . . . on the grounds of . . . lack of capacity At the
6 time of Kurt Cobain's death, the band was not a partnership either legally
or artistically. Afterwards, both Courtney Love and her attorney were for
a time incapacitated.

7 Exhibit B, Complaint for Declaratory Judgment at ¶ 36, Declaration of M. Moore (emphasis
8 added). Reiterating this claim, Plaintiffs' complaint further states that Ms. Love "executed the
9 L.L.C. agreement" "at a time when [her] judgment had been significantly impaired." *Id.* at ¶ 23.

10 Additionally, independent of the allegations contained in Plaintiffs' complaint, Ms. Love
11 has also publicly claimed on numerous occasions that the L.L.C. Agreement is not enforceable
12 because she was "stoned" at the time of its formation. Exhibit C, Internet posting by C. Love²
13 ("bottom line - this 'LLC' was formed by a very smart lawyer when I was stoned"); Exhibit D,
14 MTV Article of October 2, 2001 ("[Krist and Dave] formed an LLC when I was stoned, so I had
15 to remove the LLC, which I'm in the process of doing and will succeed at"), Declaration of M.
16 Moore.

17 **C. Defendants' Counterclaims Regarding Ms. Love's Capacity.**

18 Defendants have alleged that Ms. Love is currently incapacitated and should therefore be
19 removed from the performance of her duties and obligations as a Member of the L.L.C.
20 Specifically, in relation to their counterclaims against Ms. Love, Defendants alleged that:

- 21 • "Love has taken numerous actions directly contradictory to the best interests
22 of Nirvana and the L.L.C., due to both her desire to further her own
23 professional and personal goals to the detriment of the L.L.C., as well as her

24 ² Ms. Love has previously admitted to posting messages on the Hole.com site under the member name
25 "Courtney," the same name utilized by the author of this message. Exhibit L, Plaintiffs' Preliminary Answers to
Defendants' First Interrogatories at 14, Declaration of M. Moore.

1 Additionally, independent of CR 35, the L.L.C. Agreement requires Ms. Love to submit to such
2 an examination upon request by the other Members of the L.L.C. For these reasons, Defendants
3 respectfully request the Court to order Ms. Love to submit to the requested mental examination
4 in Seattle before June 1, 2002.

5 II. FACTS

6 A. The Limited Liability Company Agreement Specifically Authorizes a 7 Medical Exam.

8 The 1997 L.L.C. Agreement signed by Ms. Love authorizes the examination of L.L.C.
9 Members believed to be incapacitated. Specifically, the L.L.C. Agreement states:

10 For purposes of this Agreement, a Member, Manager or Designated
11 Representative shall be treated as having become "Incapacitated" upon ...
12 the date that the LLC receives a written opinion from ... a physician
13 mutually designated by the LLC (i.e., by a vote of the Members other than
14 the Member whose incapacity ... is in question ...) to the effect that such
15 Member ... is incapacitated as such term is defined under Chapter
16 11.88.010(1)(b) of the Revised Code of Washington (i.e., "demonstrated
17 an inability to adequately manage property or financial affairs") and that
18 incapacity can reasonably expect to continue for a period of at least six (6)
19 months from the date of such opinion ... Each Member¹ ... hereby
20 covenants and agrees to make themselves ... available for such
21 examination within a reasonable time to cooperate with any physician so
22 designated by the members of the LLC to determine whether such
23 Member ... is incapacitated.

24 Exhibit A, Limited Liability Company Agreement of Nirvana, L.L.C. dated September 24, 1997
25 at 20-21, Declaration of M. Moore. When a Member is incapacitated, the Member's designated
representative assumes his or her responsibilities with regard to the L.L.C. *Id.* at 20.

As discussed below, while Defendants have made several attempts to exercise their rights
under the L.L.C. Agreement to have Ms. Love examined, she has refused. Declaration of M.
Moore at ¶ 2.

¹ Ms. Love is a "Member." See § 1.21.

1 inability and incapacity to responsibly fulfill her role and duties as a member
2 of the L.L.C."

- 3 • "Notwithstanding her promises and written agreements, Love has consistently
4 breached her obligations under the L.L.C. Agreement and demonstrated an
5 incapacity to fulfill her role as a member of the L.L.C."
- 6 • "Love's handling of her conflicts of interest are only some of the examples of
7 her inability to fulfill her obligations as a Member of the L.L.C. Love's
8 business and personal judgment also makes her incompetent to be a Member
9 of the L.L.C. . . . Love has demonstrated an inability to cooperate, coexist, and
10 work with managers, attorneys, or fellow band members. Since 1992, Love
11 has hired and fired (or, in certain cases, been fired by) numerous personal
12 managers, attorneys, business managers, and band mates . . . In her
13 professional dealings, Love is irrational, mercurial, self-centered,
14 unmanageable, inconsistent, and unpredictable."

15 Exhibit E. Defendants' Answer, Affirmative Defenses and Counterclaims at page 8 ¶ 4, page 12
16 ¶ 22, and page 15 ¶ 32, Declaration of M. Moore (emphasis added).

17 Based on these factual allegations, in the form of a claim for declaratory relief,
18 Defendants specifically requested the Court to declare that there:

19 is an actual and existing controversy between Counterclaimants and Love
20 and possibly others, because such parties have genuine and opposing
21 views with respect to whether or not Love is incapacitated and should be
22 removed from performance of her duties and obligations as a Member of
23 the L.L.C. A judicial determination of the controversy will be final and
24 conclusive as to the rights and obligations of the parties with respect to
25 this issue. Counterclaimants request that this Court declare that Love,
under the terms of the L.L.C. Agreement, has become incapacitated and
that her rights to vote should be assigned to a Designated Representative.
Counterclaimants request that this Court also declare that Love has
demonstrated an inability to adequately manage property or financial
affairs rendering her incapacitated to perform her duties under the L.L.C.
Agreement.

Id. at 18-19 (emphasis added).

1 **D. Defendants' Repeated Requests to Conduct a Psychiatric Examination of Ms.**
2 **Love.**

3 On February 5, 2002, pursuant to both CR 35 and the terms of the L.L.C. Agreement,
4 counsel for Defendants requested counsel for Ms. Love to provide dates that she would be
5 available for a psychiatric exam. Exhibit F, February 5, 2002 Letter to Yale Lewis from Kelly
6 Corr, Declaration of M. Moore. Counsel for Plaintiffs did not respond to this request. On March
7 11, 2002, Defendants' counsel again wrote to Plaintiffs' counsel and inquired as to whether Ms.
8 Love would make herself available for examination. Exhibit G, March 11, 2002 Letter to Yale
9 Lewis from Kelly Corr, Declaration of M. Moore. Again, Counsel for Plaintiffs did not respond.
10 Finally, on March 22, 2002, counsel for Ms. Love indicated that she would not voluntarily
11 submit to an examination. Declaration of M. Moore at ¶ 3.

12 **E. The Pending Discovery Cutoff.**

13 This case is currently set for trial on September 30, 2002. The discovery cutoff is August
14 19, 2002, less than five months from today's date.

15 **III. ARGUMENT**

16 **A. Pursuant to CR 35, The Court Should Order Ms. Love To Submit To The**
17 **Requested Examination.**

18 Upon a showing that a given party's mental state is "at issue," and that "good cause"
19 exists for such examination, Washington's courts have the discretion under CR 35(a) to order the
20 party to submit to a mental examination. In re Williams, 106 Wn. App. 85 (2001). Good cause
21 for an examination exists where the information sought is not available from other sources. Id. at
22 96 (when determining whether party has satisfied good cause standard, courts look to the ability
23 of the movant "to obtain the desired information by other means").

24 In order to satisfy the "at issue" standard, the moving party need only present "sufficient
25 information" to support the assertion that a party's capacity is at issue. In re Welfare of Green,
14 Wn. App. 939, 942 (1996). Allegations within an answer or complaint may satisfy this

1 standard. Ragge v. MCA/Universal Studios, 165 F.R.D. 605, 609(C.D. Cal. 1995) (allegations
2 of emotional distress in plaintiff's complaint sufficiently placed plaintiff's mental state "in
3 controversy" and establish "good cause" to compel mental examination under Rule 35); In re
4 Welfare of Green, 14 Wn. App. at 942 ("Of course, there are situations where pleadings alone
5 are sufficient" to satisfy standard). A party may also submit affidavits or declarations that
6 contain additional, supporting information. Id. at 942-43 ("the showing could be made by
7 affidavits or other usual methods").

8 Moreover, the very nature of certain types of claims or proceedings can render a party's
9 mental capacity at issue. For example, where a specific type of claim is directly related to the
10 mental capacity of a party, the party's mental capacity is placed "at issue" merely by the
11 initiation of the proceeding. See id. at 943-44 (because the very purposes of parental rights
12 termination proceeding was to examine parent's suitability, the nature of the proceeding placed
13 parent's mental capacity at issue).

14 **1. Good Cause Exists For The Examination.**

15 There is simply no method of securing definitive information relating to Ms. Love's past
16 or current capacity other than the requested examination. As a result, the good cause exists for
17 Ms. Love's examination. In re Williams, 106 Wn. App. at 96.

18 **2. Ms. Love Affirmatively Placed Her Capacity At Issue In This Litigation.**

19 Plaintiffs' complaint plainly states that Ms. Love "executed the L.L.C. agreement" "at a
20 time when [her] judgment had been significantly impaired," and further seeks to avoid the L.L.C.
21 Agreement due to Ms. Love's alleged "lack of capacity." Exhibit B at ¶ 23, 36. Even if the
22 Court were to ignore these affirmative allegations, Ms. Love's public statements to the effect that
23 the L.L.C. agreement is unenforceable because she was "stoned" at the time of its creation
24 clearly place Ms. Love's capacity to enter into the L.L.C. Agreement at issue. Exhibits C and D.
25 This situation is no different from that of any plaintiff who places her mental or physical

1 condition at issue and then attempts to deny a defendant access to the information necessary to
2 defend itself against such claims. Given that Ms. Love's allegations have clearly placed her
3 capacity at issue, Defendants should have the opportunity to test allegations through an
4 independent psychiatric examination of Ms. Love.

5 **3. Defendants' Allegations And Ms. Love's Conduct Have Placed Ms.**
6 **Love's Current Capacity at Issue.**

7 Based on Ms. Love's behavior in her dealings with Defendants since she executed the
8 L.L.C. Agreement, as well as her dealings with third parties, Defendants have alleged "sufficient
9 information" to call into question Ms. Love's mental capacity. As detailed within the
10 Defendants counterclaims, Ms. Love appears to lack the capacity to abide by the terms of any
11 agreement to which either she or Nirvana L.L.C. is a party. Exhibit E. For example, despite the
12 fact that the L.L.C. Agreement clearly requires a vote of all the Members of Nirvana L.L.C. for
13 such decisions, Ms. Love has unilaterally attempted to terminate Nirvana's accountants and
14 managers. Exhibit H, August 9, 2000 Letter from James Zumwalt to Jill Berliner and August 3,
15 2001 Letter from Courtney Love to Lee Johnson, Declaration of Moore. During this same
16 period, Love has hired and fired countless managers, attorneys, and band mates. Ms. Love has
17 been accused of physically attacking several persons during this time.³ Exhibit I, various media
18 articles, Declaration of M. Moore. Indeed, Ms. Love openly claims to have "almost got in a
19 fistfight" with a young recording artist, Christina Aguilera, less than one month ago. Exhibit J,
20 *Dallas Morning News* article, Declaration of M. Moore. Most importantly, Ms. Love openly
21 acknowledges that her use of illegal drugs has substantially impeded her competency. Exhibits
22 C and D, Declaration of M. Moore. Based on these facts, there is clearly an objective basis for
23 believing that Ms. Love is not competent.

24
25 ³ During the past seven years, Ms. Love has been accused of physically attacking at least four people.
Exhibit I, Declaration of M. Moore.

1 In addition to these facts, the very nature of the counterclaims asserted by Defendants
2 places Ms. Love's current capacity at issue. Defendants allege that Ms. Love lacks the mental
3 capacity to perform as a Member of Nirvana L.L.C. and should be removed as a representative to
4 the L.L.C, a claim that obviously places Ms. Love's competency at issue.

5 **B. Pursuant To The Terms Of The L.L.C. Agreement, Ms. Love Must Submit**
6 **To The Requested Examination.**

7 The Court has previously ruled that "[n]o party has presented evidence to this Court
8 sufficient to permit this Court to set aside or disregard the LLC's organizing documents."
9 Exhibit K, Memorandum Ruling on Motion for Injunctive Relief at 2, Declaration of M. Moore.
10 To the contrary, the Court based its prior decision to grant Ms. Love's request for injunctive
11 relief on the "clear contractual power" vested in Ms. Love by the terms of the L.L.C. Agreement.
12 Exhibit K at 9, Declaration of M. Moore.

13 In addition to providing Ms. Love with these contractual benefits, the L.L.C. Agreement
14 also provides Messrs. Grohl and Novoselic with the right to require Ms. Love to submit to a
15 mental examination. Specifically, Ms. Love expressly agreed under the L.L.C. Agreement that
16 she would make herself "available for [a psychiatric] examination within a reasonable time to
17 cooperate with any physician so designated by the members of the LLC to determine whether
18 such Member . . . is incapacitated." Exhibit A at Section 1.21, Declaration of M. Moore.

19 As it has done for Ms. Love's benefit, the Court should enforce the terms of the L.L.C.
20 Agreement and allow Defendants to conduct a reasonable psychiatric examination of Ms. Love.
21 To hold otherwise would effectively deny Defendants their rights under the L.L.C. Agreement,
22 and severely impede their ability to disprove the claims of Ms. Love and to prove their
23 counterclaims against Ms. Love.
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IV. CONCLUSION

For foregoing reasons, Defendants respectfully request the Court to order plaintiff Courtney Love to submit to a psychiatric examination in Seattle prior to June 1, 2002.

DATED this 11th day of April, 2002.

CORR CRONIN LLP


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Michael A. Moore, WSBA No. 27047
Attorneys for Defendants

DEFENDANTS' MOTION TO COMPEL MENTAL
EXAMINATION OF PLAINTIFF COURTNEY LOVE - 9

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

COURTNEY LOVE COBAIN, individually, and
on behalf of FRANCES BEAN COBAIN, the
minor child of COURTNEY LOVE COBAIN
and KURT COBAIN,

Plaintiffs,

v.

DAVID GROHL, KRIST NOVOSELIC,
NIRVANA L.L.C., a Washington Limited
Liability Company,

Defendants.

No. 01-2-13059-5 SEA

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR A
PSYCHIATRIC EXAMINATION OF
COURTNEY LOVE COBAIN

I. INTRODUCTION AND RELIEF REQUESTED.

A year ago, Courtney Love Cobain, on behalf of herself and her daughter, initiated this action for judicial dissolution of the Nirvana Limited Liability Company (the "L.L.C.") Last month, Defendants—through their counsel—announced that she would be a fool not to settle with them and promised that the trial would be a circus:

"You read the L.L.C. agreement, you read the complaint, and what's really going on is [Love] has her stink with U.M.G. over Hole and she's using Nirvana as leverage," says Kelly Corr, the Seattle lawyer representing Grohl and Novoselic. "She is a fool if she doesn't settle with us, because we're going to court and we're gonna beat her. Come on out for the trial. It will be a hell of a lot of fun—a real circus!"

See, Exhibit 1 at p. 9 to the Declaration of O. Yale Lewis, Jr. ("Lewis Decl."), filed herewith. Now

PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION FOR A PSYCHIATRIC EXAMINATION - 1
(45009.DOC)

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Defendants seek a judicial order compelling her to submit to a "psychiatric examination at a mutually convenient date and time in Seattle prior to June 1, 2002." Presumably, Defendants would select the psychiatrist and specify the scope of the examination. Shades of Frances Farmer. This request, which is supported by little, if anything, other than website gossip¹ and Defendants' attorneys' unsupported pleading allegations, is both meritless and a further indication that the L.L.C. should be terminated. Consequently, Plaintiffs request denial of Defendants' motion.

II. STATEMENT OF FACTS.

This is an action for declaratory judgment; breach of fiduciary duty; breach of the duty of good faith and fair dealing; breach of contract; and for relief from oppression of a minority shareholder. Plaintiffs seek the judicial dissolution of the L.L.C.

The L.L.C. has been in existence since about September 1997—almost five years. During this time, although Defendants Grohl and Novoselic have frequently subjected Ms. Love to mean-spirited public attacks,² they never asserted that she was mentally incapacitated. Now, however, following her request for judicial dissolution of the L.L.C., Defendants claim that she is mentally incapacitated and seek to subject her to a court ordered psychiatric examination.³

The Complaint does not allege that Ms. Love was mentally incapacitated when she signed the L.L.C. Agreement in 1997,⁴ and on her behalf, Plaintiffs' counsel has specifically disavowed any claim that she was mentally incapacitated at that time.⁵

Ms. Love does claim that for a time following her husband's suicide she was struggling

¹ Courtney Love is one of the most famous people in the world. In an average month, she is the topic of 20-25 press pieces which generate thousands of internet postings, most of which are positive; some of which are not. It would be excessively burdensome if—in this litigation—if she is required to refute down every piece of negative opinion Defendants can find.

² See, e.g., Exhibit 2 to the Declaration of O. Yale Lewis, Jr. ("Lewis Decl.")

³ In this case, Defendants were represented by Heller, Ehrman for approximately six months, during which time they raised no issue of mental incompetence.

⁴ All of the relevant factual allegations are contained in paragraph 20 through paragraph 24, which—together with paragraph 36 of Plaintiff's First Claim for Relief—are set out in their entirety in Exhibit 3, Lewis Decl.

1 with her emotions. As a consequence—while the Cobain estate was being settled by a plethora of
2 Seattle, Yakima and California attorneys, accountants, appraisers and IRS agents—Ms. Love did
3 not participate actively either in the proceedings or in the management of Estate assets, except to
4 give a deposition, sign documents and participate in settlement proceedings of the case filed
5 against her by a guardian ad litem who had been appointed to represent the interests of Ms. Love's
6 daughter.⁶ Then, months after the estate proceedings had been resolved, when she was presented
7 with an L.L.C. Agreement she had not signed, she agreed to be bound by it because of a mistaken
8 fear that if she did not she would have to transfer all of Frances's and her interests in her
9 husband's estate to Messrs. Grohl and Novoselic.
10

11 All parties now agree that the L.L.C. is irretrievably dysfunctional, and Ms. Love has
12 presented Defendants with an eminently reasonable reorganization proposal⁷ which Defendants
13 have refused to consider; claiming instead that she is "mentally incapacitated" and a "fool" and
14 should be replaced.
15

16 The standard of mental incapacity under the L.L.C. Agreement is that set forth in RCW
17 11.88.010(1)(b), which provides in relevant part:

18 ... the individual is at significant risk of financial harm based upon
19 a demonstrated inability to adequately manage property or financial
20 affairs.

21 III. STATEMENT OF ISSUES.

22 1. Have Defendants met their affirmative double burden under CR 35 to demonstrate
23 that the current mental condition of Courtney Love is genuinely in controversy and that there is
24 good cause to subject her to a court ordered psychiatric examination?

25 2. Have Defendants complied with the procedural requirements of CR 35, which
26

27 ⁵ See Exhibit 4, Lewis Decl.

28 ⁶ This was the declaratory judgment action to determine the effect of the ante-nuptial agreement. It was settled in late

1 require a specification of the identity of the examiner, and the time, place, manner, condition and
2 scope of the requested psychiatric examination?

3 3. Are Defendants entitled to an examination under the L.L.C. Agreement where they
4 offer no cognizable evidence that a) the L.L.C.'s members have a reasonable basis to believe that
5 Ms. Love is mentally incapacitated; and b) that the members have initiated this process consistent
6 with the procedures set forth in the L.L.C. Agreement?

7 4. Have Defendants—who seek prejudgment enforcement of an agreement whose
8 validity is at issue—satisfied the procedural and substantive requirements for mandatory
9 preliminary injunctive relief?
10

11 IV. EVIDENCE RELIED UPON.

12 Plaintiffs rely on the absence of any cognizable evidence supporting the request for relief
13 and on the Declarations of Courtney Love Cobain and O. Yale Lewis, Jr., with attached exhibits.
14

15 V. LEGAL AUTHORITY.

16 The practice [of seeking a psychiatric examination] seems to
17 be more and more in vogue of late for defendants to seek to partake
18 of the *in terrorem* tactic of visiting upon a plaintiff a particularly
19 intrusive incursion: examination by a psychiatrist, and other
20 psychological delvings.

21 . . . it has been observed in some quarters that discovery . . . has
22 been used as a way to harass and intimidate plaintiffs into dropping
23 their lawsuits, rather than subjecting themselves to the gauntlet of
24 pretrial probings.

25 *Smith v. J.I. Case Corp.*, 163 F.R.D. 229, 232 (E.D. Pa. 1995). Like the request in *Smith*,
26 Defendants request “squarely falls within that category and is not to be countenanced.” *See id.*

27 A. Defendants Have Failed to Satisfy the Requirements of CR 35.

28 CR 35 differs from all other discovery devices in that it imposes on movants the

1996.

⁷ See Exhibit S, Lewis Decl.

1 affirmative burden of demonstrating that 1) the mental condition of Plaintiff is "in controversy";
2 and 2) there is "good cause" for the specified psychiatric examination.⁸ *Schlagenhauf v. Holder*,
3 379 U.S. 104, 117-118, 85 S. Ct. 234, 113 L. Ed. 2d 152 (1964).⁹ These requirements are "plainly
4 expressed limitation[s]" on the discovery process, 379 U.S. at 118, and "not a mere formality[:]"

5 They are not met by mere conclusory allegations of the pleadings—
6 nor by mere relevance to the case—but require an affirmative
7 showing by the movant

8 Rule 35, therefore, requires discriminating application by the trial
9 judge, who must decide, as an initial matter in every case, whether
10 the party requesting a mental . . . examination . . . has adequately
11 demonstrated the existence of the Rule's requirements of 'in
12 controversy' and 'good cause,' [T]he movant must produce
13 sufficient information, by whatever means, so that the district judge
14 can fulfill his function mandated by the Rule.

15 *Id.* at 118-19.¹⁰

16 Even where the good cause and in controversy requirements have been met, it is still
17 within the Court's discretion to determine whether to order an examination. *Moore v. Calavar*
18 *Corp.*, 142 F.R.D. 134, 135 (W.D. La. 1992); *Stinchcomb v. United States*, 132 F.R.D. 29, 30 (E.
19 D. Pa. 1990); *Hardy v Riser*, 309 F. Supp. 1234, 1241 (N.D. Miss. 1970). A determination not to
20 permit a psychiatric examination will be reviewed only for abuse of discretion. *Beagle v. Beagle*,
21 57 Wn.2d 753, 756 (1961).

22 1. *Defendants Have Not Satisfied the "In Controversy" Requirement.*

23 Although there is "no hard and fast rule" for articulating when a party's mental condition is

24 ⁸ CR 35 has been adopted—with certain modifications—from the federal rule and thus, federal courts' construction of
25 the federal rule is pertinent. *In re Green*, 14 Wn. App. 939, 942 (1976), citing *Eberle v. Sutor*, 3 Wn. App. 387
26 (1970).

27 ⁹ In *Schlagenhauf*, the leading federal case construing Rule 35, Federal Rules of Civil Procedure, the Supreme Court
28 vacated the lower court's order for a Rule 35 psychiatric examination because movants failed to introduce sufficient
record evidence to discharge their affirmative burden of proof: "Nothing in the pleadings or affidavit would afford a
basis for a belief that Schlagenhauf was suffering from a mental or neurological illness warranting wide-ranging
psychiatric or neurological examinations." *Id.* at 120.

¹⁰ Rule 35 is not coextensive with Rule 26, which generally permits discovery by interrogatory or document request if
the information sought is "relevant to the subject matter involved in the pending action." See *In re John A. Mitchell*,
563 F.2d 143 (5th Cir. 1977). See also *Gulfport Nat. Bank v. Southern Ry. Co.*, 297 F.2d 921 (4th Cir. 1962) (there

1 "in controversy," courts generally require 1) a separate cause of action for emotional distress;
2 2) an allegation of a specific mental or psychiatric injury or disorder; 3) a claim of unusually
3 severe emotional distress; 4) plaintiff's offer of expert testimony to support a claim of emotional
4 distress; and/or 5) plaintiff's concession that his or her mental condition is "in controversy." See
5 *Smith v. J.I. Case*, 163 F.R.D. at 230, citing *Turner v. Imperial Stores*, 161 F.R.D. 89, 95-96 (S.D.
6 Cal. 1995) (refusing examination in wrongful termination case) and *Bridges v. Eastman Kodak*
7 *Co.*, 850 F. Supp. 216, 222 (S.D.N.Y. 1994) (refusing examination in sexual harassment case).
8 See also *Houghton v. M & F Fishing*, 198 F.R.D. 666 (S.D. Cal. 2001) (Jones Act personal
9 injury).¹¹ Each of the cases cited by Defendants and permitting a mental examination embodies
10 one of these characteristics,¹² none is present in this case.

12 To the extent Ms. Love's mental state is mentioned in the complaint, it is her past mental
13 state. Claims for past emotional disturbance generally do not warrant examinations. See *Winters*
14 *v. Travia*, 495 F.2d 839, 840-841 (2d Cir. 1974); *Coca-Cola Bottling Co. v. Negron Torres*, 255
15 F.2d 149, 153 (1st Cir. 1958); *Curtis v. Express, Inc.*, 868 F. Supp. 467, 469 (N.D.N.Y. 1994);
16 *Robinson v. Jacksonville, Inc.*, 118 F.R.D. 525 (M.D. Fla. 1988); *Cody v. Marriott*, 103 F.R.D.
17 421 (D. Mass. 1984). Moreover, the complaint's reference is to Ms. Love's response to her
18 husband's suicide. Ordinary or expected reactions to events at issue—such as distress, anguish or
19 embarrassment—do not place a plaintiff's psychiatric condition in controversy. *Fox v. Gates*, 179

21 must be greater showing of need under FRCP 35 than under the other discovery rules) (dicta).

22 ¹¹ In each case, psychiatric examination was denied. In *Jones*, psychiatric examination was denied, even though
23 supported by movant's retained psychiatric expert, who argued that plaintiff's damages were due, in part, to
24 "significant psychiatric conditions, including a characterologic disorder and drug abuse disorders." *Id.* at 669.

25 ¹² In *Ragge v. MCA/Universal Studios*, 165 F.R.D. 605 (C.D. Cal. 1995), the plaintiff did not object to an examination,
26 only to the specific scope and conditions (issues that cannot be addressed in the present case because Defendants
27 never detailed the terms of their proposed examination.) *State v. Williams*, 106 Wn. App. 85 (2001) was a civil
28 commitment proceeding for two sexually violent predators in which potentially permanent terms of incarceration were
at stake. The core issue was the currency and accuracy of findings based on prior examinations which the felons
contested. In *In re Welfare of Green*, 14 Wn. App. 939 (1976), the state of Washington sought to permanently deprive
a mother of custody of her minor children on the ground that she was an unfit parent. The preeminent concern—the

1 F.R.D. 303 (D. Colo. 1998). *E.E.O.C. v. Old Western Furniture Corp.*, 173 F.R.D. 444 (W.D.
2 Tex. 1996). *Smith v. J.I. Case, supra*. *Neal v. Siegel-Robert*, 171 F.R.D. 264 (D. Mo. 1996).
3 Where there are no special allegations of specific psychological symptoms or injury or unusually
4 severe emotional distress, examination is denied. *Ford v. Contra Costa County*, 179 F.R.D. 579
5 (N.D. Cal. 1998).

6 Though Defendants argue broadly that a "psychological component" is implicated by their
7 "evidence" (most of which is riddled with hearsay), this is the very ground found *insufficient* in
8 *Houghton, supra*. Defendants do not make any allegation or offer any evidence of a specific
9 psychiatric injury or disorder.

11 2. *Defendants Have Not Demonstrated Good Cause to Order a Psychiatric*
12 *Examination of Plaintiff.*

13 There is no "good cause" if pertinent information can be obtained from some less intrusive
14 source. *Pearson v. Norfolk-Southern Ry. Co.*, 178 F.R.D. 580 (M.D. Ala. 1998); *Marroni v.*
15 *Matey*, 82 F.R.D. 371, 372 (E.D. Pa. 1979), citing *Wright & Miller Federal Practice &*
16 *Procedure*, Vol. 8 § 2234 (1970). In this case, Defendants, who have not taken Plaintiff's
17 deposition, cannot assert that any relevant information cannot be obtained from her deposition or
18 that her deposition demonstrates a need for an examination. Similarly, psychiatric evaluations are
19 refused where the plaintiff did not propose to use any expert testimony on the subject. *E.g., Ford*
20 *v. Contra Costa County, supra*, 179 F.R.D. 579.

22 3. *The Materials Offered By Defendants Do Not Constitute Cognizable*
23 *Evidentiary Support for an Examination.*

24 Given the affirmative burdens on Defendants described above, one would expect to see a
25 record supported by admissible evidence strongly suggesting a severe, on-going mental disorder,
26 and clearly implicating legal incapacity over a significant period of time. However, Defendants'

27 children's welfare — warranted an examination.

1 evidence is exceptionally weak and tenuous. Defendants offer only *their attorney's declaration*,
2 most of which mustered second or third hand innuendo (sometimes hearsay within hearsay within
3 hearsay within hearsay), and Defendants' conclusory pleadings. None of this suggests that
4 Ms. Love is currently suffering from a mental or neurological illness that would warrant "wide-
5 ranging psychiatric or neurological examinations." *Schlagenhauf*, 379 U.S. at 120. Consequently,
6 Defendants have failed to carry their affirmative burdens of proof.

7
8 Defendants' proffer of web-based material is especially appalling. For example,
9 Defendants submitted hearsay reports of a) an alleged assault at a rock concert—that was
10 *dismissed* six and a half years ago; b) a comment by Ms. Love-Cobain, who humorously claimed
11 to have been *annoyed* at Christine Aguilera; and c) two gossipy web items (not for attribution)
12 claiming that celebrity reporter Belissa Cohen and Courtney Love were in some sort of altercation
13 at a fashion show. Defendants also allude to an incident with rock singer Kathleen Hanna some
14 seven years ago. Although the facts of the incident are not clear, the form of Defendants'
15 evidence is: this is another item posted on an entertainment website, based upon undisclosed
16 sources.¹³ Defendants rely on a so-called "Profile" of Ms. Love, wholly without foundation. This,
17 too, comes from a web page and appears, from its internet address, to be generated by, or
18 associated with, some sort of student group in the U.K. Any basis for the profiler's knowledge is
19 not shown.
20

21 Defendants submitted two documents purportedly from Ms. Love and one from her
22 attorney, none of which remotely suggests incapacity. In the August 3, 2001 letter, Ms. Love
23

24 ¹³ In the end, whether Ms. Love did, or did not, take a swing at Kathleen Hanna (and upon what provocation) is really
25 beside the point. In the context of an alternative rock concert, at a time when "mosh" pits were the scene of some very
26 vigorous physical activity (including large groups of people slamming into each other while dancing), the mere fact
27 that competing lead singers of punk rock bands got into a shouting, or shoving, match with each other—or even that
28 one mouthed-off to the other (and paid the price)—is unremarkable. As Judge Halker noted when dismissing the
Orange County suit, "the teens weren't exposed to any greater amount of violence than could reasonably be expected
at an alternative rock concert." See Exhibit I to Declaration of Michael A. Moore.

1 terminated the services of Mr. Lee Johnson, an accountant, and requested an accounting of any
2 payments Mr. Johnson made on behalf of the Estate of Kurt Cobain at any time, and on behalf of
3 the Cobain family before April 1994 (the time of Kurt Cobain's death). The second document
4 comes from a web page called "hole.com," an internet site devoted generally to the music of
5 Ms. Love's band, "Hole." Posting a comment under the name "Courtney," the author writes about
6 the present dispute—and its practical implications—with insight, humor, and directness. This
7 posting does not claim that Ms. Love was "stoned" when she signed the L.L.C. Agreement as
8 Defendants imply. The actual quote refers only to the time-frame during which the L.L.C. "was
9 formed" (emphasis added): "other bottom line- this 'llc' was formed by a very smart lawyer when
10 i was stoned- and it doesnt work." One would be hard pressed to improve on the conclusion.
11

12 In short, Defendants' materials do not evidence the type of severe and ongoing "mental
13 disorders and psychiatric aberrations" that Rule 35 was intended to address. *See Tomlin v.*
14 *Holecek*, 150 F.R.D. 628 (D. Minn. 1993). *See also Cody, supra*, 103 F.R.D. at 423 (psychiatric
15 disorder).
16

17 Defendants' argument that their pleadings have placed Ms. Love's mental capacity at issue
18 is also unavailing. In fact, the so-called factual allegations of Defendants' counterclaims do not
19 even allege that she is mentally incapacitated. Rather, those allegations are nothing more than
20 Defendants' assertions that she lacks the capacity to conduct herself as Defendants would prefer,
21 and a claim to the effect that Ms. Love does not work and play well with others, which—even if
22 proven—doesn't establish or even suggest that she is mentally incapacitated.¹⁴ It is not until their
23

24 ¹⁴ Defendants only attempt at factual support for their contention is that Ms. Love has experienced more turnover in
25 her professional life than they have in theirs. In fact, the turnover in Ms. Love's professional life has been relatively
26 less than that experienced by Messrs. Grohl and Novoselic, except for the personal ties between Messrs. Grohl and
27 Novoselic and the L.L.C.'s attorney, accountant and professional managers which in Plaintiffs' view constitutes a
28 conflict of interest for the L.L.C. For example, since Kurt Cobain's death, five musicians have, at various times, been
part of the four-person band "Hole." In contrast, according to the Foo Fighters' website, seven musicians have cycled
through the four-person band "Foo Fighters," Love Decl., ¶ 4. Mr. Novoselic's band Sweet 75 failed spectacularly.

1 claim for Declaratory relief that Defendants even acknowledge the statutory standard that is
2 incorporated into the L.L.C. Agreement.

3 *4. Defendants' Have Not Satisfied the Specification Requirements of CR 35.*

4 Defendants have failed to specify even the identity of their proposed examiner; much less
5 his or her qualifications. They do not suggest the nature of the examination, the methodology to
6 be followed, or the scope of the proposed inquiry. The requested examination is impermissibly
7 boundless. See CR 35(a)(1). By ignoring the specification requirements of CR 35, Defendants
8 undermine vital procedural safeguards intended to force measured restraint in the use of a highly
9 intrusive procedural device.

10
11 **B. Defendants Have Not Shown an Entitlement to an Examination Under the
L.L.C. Agreement.**

12 Defendants suggest that they have an absolute contractual right under Section 8.7
13 ("Incapacity") of the L.L.C. Agreement to a psychiatric examination of Ms. Love merely because
14 they have requested it. However, because they seek to invoke the Court's power to order such an
15 examination, the standards of CR 35 are necessarily implicated. Further, under the L.L.C.
16 Agreement, Defendants must have "good cause" to believe that a member is "incapacitated."

17
18 *1. Defendants Have Failed to Offer Evidence of "Incapacity" as
19 Contemplated by Section 8.7.*

20 While CR 35 merely requires that a party's mental condition be "in controversy," an
21 examination under Section 8.7 of the L.L.C. Agreement is for the purpose of establishing
22 "incapacity" under the standard of RCW 11.88.010(1)(b). Thus, consistent with the parties' duties
23 to each other as members of the L.L.C., a request for examination should be premised upon (1) an
24 actual and reasonable belief that a member is unable to manage her property or financial affairs,
25 "at significant risk of financial harm" and therefore, "incapacitated;" and (2) movant's compliance
26

27 See Exhibit 6, Lewis Decl.

with the procedures set forth in the L.L.C. Agreement.

2. "Reasonable Belief" and "Good Cause" Are Implied Covenants of the Parties' L.L.C. Agreement.

Consistent with the implied covenant of good faith and fair dealing that is a part of every Washington contract,¹⁵ a "good faith" belief in the necessity of such an examination is required. "Good cause" for an examination also is a necessarily implied term of Section 8.7¹⁶ and therefore as much a part of the L.L.C. Agreement, see *Suess v. Heale*, 68 Wn.2d 962 (1966), as it is a predicate for an examination under CR 35. See pp. 5-7, *supra*.

3. Defendants Have Failed to Support Their Motion Under the L.L.C. with any Evidence of Ms. Love's Incapacity, or a Good Faith Need for an Examination.

Neither Defendant has offered a sworn statement as to his personal belief or the basis therefor. Defendants have also failed to support their motion under the L.L.C. with any evidence that Ms. Love has mismanaged property or financial affairs, or has a severe, ongoing incapacity that one "can reasonably expect to continue for a period of at least six (6) months . . ." Although Defendants' legal argument vaguely references various votes of the L.L.C.'s members, there is no evidence of any vote.¹⁷ Similarly, if allegations of contractual controversy¹⁸ were sufficient to warrant a psychiatric examination, the psychiatrists and judges of King County would be busy

¹⁵ In every contract, there is an implied covenant of good faith and fair dealing. *Metropolitan Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 437 (1986), *recon. denied*. It applies when the manner of performance allows for discretion to determine a contract term. *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 739, *recon. denied, rev. denied*, 133 Wn.2d 1033 (1997).

¹⁶ While Section 8.7 does not expressly state the conditions under which a member will be examined, the purpose of an examination is to determine that a member is incapacitated and unable to vote and otherwise function as a manager. See Sections 8.6 and 8.7. There is no other legitimate reason for requesting an examination. Thus, "good cause" for a psychiatric examination is indispensable to effectuate the intent of Section 8.7 and unnecessary to express. Thus, it is an implied covenant of Section 8.7. See, e.g., *Fuller Market Basket, Inc. v. Gillingham & Jones, Inc.*, 14 Wn. App. 128, 134, *rev. denied*, 86 Wn.2d 1004 (1975). *Tiegs v. Boise Cascade Corp.*, 83 Wn. App. 411, *aff'd*, 135 Wn.2d 1 (1996) (a covenant is implied if (1) implication arises from language used or is indispensable to effectuate the intent of the parties; (2) from the language used, it were clearly within the contemplation of the parties that they deemed the covenant unnecessary to express; (3) implied covenants can only be justified on grounds of legal necessity; (4) it can be rightfully assumed that the covenant would have been made if attention had been called to it).

¹⁷ Nor did Defendants demonstrate a factual basis for their unsupported allegation that Ms. Love had wrongfully fired anyone or numerous persons.

indeed. The reality is that Ms. Love is widely perceived to be smart, able, funny, principled, and determined.¹⁹ In just the last month, she has been invited to write guest editorials for both *The New York Times* and *The Wall Street Journal*. Love Decl., ¶ 3.

VI. CONCLUSION AND PROPOSED ORDER.

Defendants have an affirmative double burden under CR 35 to show that her mental capacity is genuinely at issue, and that there is good cause for a psychiatric examination. They have accomplished neither task. Nor have they presented a cognizable evidentiary basis for a good faith belief that she is mentally incapacitated as defined by RCW 11.88.010(1)(b), or shown that the L.L.C., as a legal entity, has complied with the decision-making procedure set out in the agreement. Finally—to the extent Defendants are seeking a prejudgment enforcement of a hotly-contested agreement—they must satisfy the requirements for a mandatory preliminary injunction, a burden they have not even attempted to meet. For all of these reasons, Ms. Love should not be compelled to submit to a psychiatric examination. A proposed order is attached.

DATED this 17th day of April, 2002.

Respectfully submitted,

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¹⁸ See Defendants' Motion to Compel Examination at 7, lines 9-10.

¹⁹ See Exhibits I and 7, Lewis Decl.